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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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COMMERCE COMMISSION

2004 AUG -6 P 1:07

CHIEF CLERK'S OFFICE

E. Jerome Malry

-vs-

Peoples Gas Light and Coke Company

Complaint as to improper servicing account,
request for audit and investigation, at
4220 S. Michigan, Chicago, Illinois.

04-0368

)Before the Hon. Judge Sainsot

**COMPLAINANT'S
BRIEF ON EXCEPTIONS TO THE
PROPOSED ORDER OF JUNE 25, 2004**

NOW comes the Complainant, by and through counsel, and states that the findings in the June 25, 2004, proposed orders in the above referenced cases are not fully supported by the record and are contrary to the Administrative Code and Illinois law. The Proposed Orders to dismiss complainant's cases were made without knowledge of extenuating circumstances that should be considered in making a decision that will leave complainant without legal recourse. The facts, the record, the applicable Administrative Code, and Illinois law support a more just and less draconian outcome.

STATEMENT OF FACTS

E. Jerome Malry, the complainant, has several properties that are served by Peoples Gas Light and Coke Company ("Respondent"). All properties house tenants. Mr. Malry has had previous problems with Respondent and became aware that Respondent was not properly, in accordance with 220 ILCS 5, Public Utilities Act, reading meters and was arbitrarily estimating utility bills for its services at the locations

that are the subject matter of his complaints (04-368;04-369; & 04-370). As a result of Respondent's incorrect bills at the subject locations, Mr. Malry was left with no other choice but to seek remedy before the Illinois Commerce Commission ("Commission").

On or about May 3, 2004, Mr. Malry filed three verified complaints with the Illinois Commerce Commission regarding the above service and billing issues. The Commission set the matter for status hearings on May 27, 2004 and noticed all parties. On May 27, 2004, prior to the beginning of the hearing, Carla Fleming, assistant to Complainant's counsel, phoned the assigned Administrative Law Judge ("ALJ") to inform the ALJ that counsel for complainant was unable to attend the scheduled hearings due to a medical emergency. Ms. Fleming requested, on behalf of counsel's office, that the matter be continued /postponed. Ms. Fleming was told that someone had to appear from counsel's office. Ms Fleming, appeared as requested by Administrative Hearing Officer at the hearing; she arrived at 2:25 p.m. approximately, the hearings were schedule at different times 04-368 was scheduled for 2:00 p.m., 04-0369 was scheduled for 2:20 p.m and 04-0370 was scheduled for 2:40 p.m.. Ms. Fleming was assured that the matter would not be dismissed and that counsel would receive notice via U.S. Postal Service. Counsel assistant also, contacted the Respondent attorney and requested an continuance, however, the Respondent counsel did not agree to an continuance and was rude to Ms. Fleming. However, when Ms. Fleming arrived at the hearing all of the cases had been combined and heard at 2:00 p.m., Counsel for Respondent had left before the scheduled times of the hearing, (See exhibits).

Thereafter, on or about June 25, 2004, the ALJ issued the Proposed Orders dismissing Complainant's cases and precluding Administrative Review.

ARGUMENT

The Proposed Orders to dismiss complainant's cases for want of prosecution should be amended to impose lesser sanctions because counsel's failure to attend one status hearing does not establish a lack of diligence as contemplated under Section 200.550, Section 200.560, and Illinois law. Counsel in fact had sent a representative on the Complainant behalf.

Section 200.550 of the Rules of Practice provides the ALJ with the authority to dismiss complaints for want of prosecution. Further reading of the language of 200.550 provides that a party must do two things should the party be unable to attend a hearing. First, the party must have *good cause* for not appearing and second, the party must provide *notice prior to the hearing*. According to this section, failure to do these two things *may* be grounds for dismissal. In this case, the ALJ has proposed to dismiss complainant's complaint in spite of complaint's efforts to perform the requirements of section 200.550. The ALJ by her own prefatory statements in the proposed orders acknowledges that complainant's counsel (via Carla Fleming) contacted the ALJ prior to the hearing, thus adhering to the second rung of the requirement. Also, Carla Fleming did arrive at 2:25 p.m. on counsel's behalf but the hearing schedule for 2:20 pm and 2:40 p.m. had been without prior notice combined with the case 04-0368 scheduled for 2:00 p.m. Although, counsel's assistant was not provided a full opportunity to provide the reason for the non-appearance, counsel had good cause for not appearing, in that counsel had a health emergency. (See Exhibit B, (attaché proof of medical emergency/doctor's statement).) Section 200.560 contemplates the need for emergency continuances.

Section 200.560(b) of the Rules of Practice provides that in the event of an emergency a motion for a continuance may be made. In this case, Ms.Fleming, contacted the ALJ prior to the scheduled hearing in an effort to provide notice, but also in an effort

to request a continuance, and Ms. Fleming did contact the opposing counsel, yet, was meet with rudeness and the opposing counsel refused to continue the cases although this was the very first time the cases was before the ALJ. The rules clearly contemplate that emergency circumstances will occur. The very nature of an emergency is that it is unplanned. Therefore, counsel's instruction to her staff to notice the ALJ and request a continuance and to appear in order to show diligence in pursuing the complainant's cases in and of itself denotes diligence on the part of counsel and a desire to secure the right to prosecute the complaints further.

The hearing missed by counsel was the first status hearing set in the matter. Counsel failure to attend, after giving prior notice of an emergency circumstance and after requesting a continuance, does not demonstrate a lack of diligence or failure to prosecute. Illinois courts have describes the behavior that raises to the level of lack of diligence as a pattern of behavior that is willful, shows bad faith, is egregious and/or abusive. Long v. Steepro et al., 213 F.3rd 983, (7th Cir. 2000). Given that this was the first status conference in the matters there is no pattern of behavior that would raise to the level contemplated by the courts. Thus, Counsel made diligent effort to comply with sections 200.550 and 200.560 and counsel's efforts do not constitute lack of diligence. To the contrary, counsel acted with the required diligence to provide the necessary prior notice. Therefore, for the reason set forth, the subject complaints should not be dismissed for want of prosecution.

The Proposed Orders to dismiss complainant's cases for want of prosecution should be amended to impose lesser sanctions as contemplated by Section 200.560 and Illinois law.

Section 200.560 includes within it the appropriate sanction for requesting emergency continuances. The section states under paragraph d:

“Any grant by a Hearing Examiner of a continuance sought by a party on less than two days notice prior to the assigned hearing date may be conditioned upon that party bearing any court reporting costs resulting from the continuance.”

Therefore, according to Section 200.560 the appropriate sanction for emergency request for continuances is that the moving party bares the associated court reporting cost. Further, well settled Illinois case law establishes that prior to imposing the “ultimate” penalty, i.e., dismissal, judges should apprise themselves of all circumstances and chose a sanction that is proportionate to the infraction. *Long v. Steepro, et. al.*, 213 F. 3rd 983, (7th Cir. 2000). In *Long*, the court reversed a dismissal of a civil action. The *Long* court quoted *Salgado v. General Motors Corp.*, 150 F. 3rd 735, (7th Cir. 1998), in saying that although the primary responsibility for the choice of appropriate sanctions was the district court’s, “the sanction selected must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction.” The *Long* court goes on to state that the interest of justice is better served by resolving cases on their merit. The court also noted that nothing in the record showed the district court had considered a lesser sanction prior to dismissing the case.

In our case, the record clearly shows that the proposed dismissal is being ordered without consideration as to the reason for the requested continuance and without consideration of lesser, more proportionate sanctions.

CONCLUSION

The Administrative Law Judge’s decision to dismiss complainant’s cases does not take into consideration all the circumstances, does not considered lesser sanctions, and

counsel's failure to appear at the May 24, 2004 status hearing does not show to willfulness, bad faith, or egregious behavior so as to justify dismissal. Thus, the dismissal is not supported by the rules, the record, or Illinois case law. Further, Respondent was not and has not been unduly prejudiced by Complainant's emergency request for continuance of the May 24, 2004 status hearings. Finally, the Rules include a lesser sanction that would effectuate the Commission's goals without cutting off complainant's legal remedies.

Therefore, complainant hereby requests that the Administrative Law Judge amend her proposed order of June 25, 2004 to impose a more proportionate, appropriate sanction as described in Section 200.560.

BRIEF ON EXCEPTIONS TO THE PROPOSED ORDERS OF JUNE 25, 2004

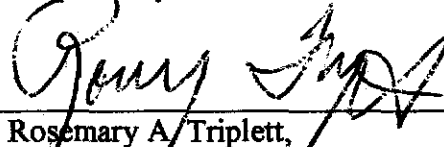
NOW comes the Complainant, by and through counsel undersigned, and list the following exceptions to the Administrative Law Judge's Proposed Order of June 25, 2004, in accordance with section 200.830 of the Rules of Practice before the Illinois Commerce Commission.

1. Complainant takes no exception to paragraph number 1 of the prefatory section of the Proposed Order dated June 25, 2004.
2. Complainant takes exception to paragraph number 2 of the prefatory section of the Proposed Order dated June 25, 2004. Specifically, complainant request the ALJ add that the person calling from Counsel's office stated that counsel was ill and unavailable due to a medical emergency, Counsel's assistant in fact contacted the opposing counsel, yet, was met with rudeness and no cooperation. Complainant assistant also appeared in person and requested a continuance on behalf of Complainant counsel
3. Complainant takes exception to paragraph number 3 of the Findings and Ordering Paragraphs of the Proposed order dated June 25, 2004, The recitals of fact and conclusions of law in the prefatory portion of this order does not supported by the record and should not be adopted as findings of fact and conclusions of law; as proposed.

4. Complainant takes exception to paragraph number 4 of the Findings and Ordering Paragraphs of the Proposed Order dated June 25, 2004. In so much as the Complaint filed by E. Jerome Malry should not be dismissed and that an status date should be reschedule. Complainant takes exception to paragraph 4 of the Findings and Ordering Paragraphs of the Proposed Order dated June 25, 2004. Specifically, Section 200.560 includes the appropriate sanction for emergency request for continuances and the ALJ has not set out nor does the record include or support justification for deviation from said sanction. The sanction under 200.560 requires the party moving for an emergency continuance to bare the court reporter cost for the hearing at which the party will not appear.
5. Complainant takes exception to the two orders appearing at the end of the Findings and Ordering Paragraphs of the Proposed Order dated June 25, 2004. Specifically, the rules, the record, and Illinois law does not support the harsh sanction of dismissal for want of prosecution.

Therefore, Complainant hereby suggest the following alternative language replace the two orders; "It Is Therefore Ordered that E. Jerome Malry shall pay the court reporter cost associated with the May 27, 2004 status hearing and shall appear either in person or through counsel at a status hearing on _____, 2004 at _____ time."

Respectfully Submitted



Rosemary A. Triplett,
Attorney for E. Jerome Malry, Complainant

Rosemary A. Triplett
P.O. Box 23501
Chicago, IL 60623

Dated this 21 day of
July, 2004 at Chicago, Illinois

Copy served on the 21 day of
July, 2004 via U.S. mail postage
prepaid to the following:

Katherine A. Donofrio
Senior Vice President
Peoples Gas Light and Coke Company
130 E. Randolph Dr., 22nd Fl.
Chicago, IL 60601

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

E. JEROME MALRY,)	
Complainant,)	ICC #04-0368
)	
VS)	
THE PEOPLES GAS LIGHT AND)	
COKE COMPANY)	
Respondent)	

NOTICE OF FILING

TO: Katherine A. Donofrio	Administrative Law Judge Claudia E. Sainsot
Senior Vice President	Illinois Commerce Commission
Peoples Gas Light	160 North LaSalle Street, Ste. C-800
130 E. Randolph , 22nd Fl.	Chicago, Illinois 60601-3104
Chicago, IL 60601	

Dated: July 21, 2004

Please take notice that on this date Complainant in the above-captioned case sent by U.S. mail for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, P. O. Box 19280, Springfield, Illinois 62701, Complainant Brief on Exceptions to the Proposed Order of June 25, 2004.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this Brief on Exceptions to the, Propose Order of June 25, 2004. by ALJ Sainsot by causing a copy to be placed in the U.S. mail, properly addressed and postage prepaid on July 21, 2004.

By: Rosemary A. Triplett


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